

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID HINDS, on behalf of
themselves and others
similarly situated,

Plaintiff,

v.

COMMUNITY MEDICAL CENTERS,
INC.,

Defendant.

No. 2:22-cv-01207-JAM-AC

**ORDER DENYING MOTION FOR
SUBSTITUTION AND GRANTING MOTION
FOR REMAND**

On November 11, 2021, David Hinds ("Plaintiff" or "Mr. Hinds") filed suit against Community Medical Centers, Inc. ("CMC") in San Joaquin Superior Court based on various state laws alleging CMC failed to protect his Protected Health Information ("PHI") and Personally Identifiable Information ("PII"). Thereafter four more cases alleging the same violations were filed against CMC and the San Joaquin Superior Court consolidated them into this class action. CMC then removed and filed its motion to substitute the United States as this suit's defendant. See Notice of Removal ("NOR"); ECF No. 1; see also Mot. to

Substitute ("Mot."), ECF No. 9. The United States and Plaintiff filed their respective oppositions and CMC replied. See US Opp'n, ECF No. 3; Pl.'s Opp'n, ECF No. 29; Reply to US Opp'n, ECF No. 35, Reply to Pl.'s Opp'n, ECF No. 34. In addition, the United States and Plaintiff filed motions to remand. See US Mot. to Remand ("US MTR"), ECF No. 27; Pl.'s Mot. to Remand ("Pl.'s MTR"), ECF No. 24. CMC filed oppositions to both, and the United States and Plaintiff filed replies. See Def.'s Opp'n to US MTR, ECF No. 32; Def's Opp'n to Pl.'s MTR, ECF No. 33; US Reply to Def's Opp'n to US MTR, ECF No. 36; Pl.'s Reply to Def's Opp'n to Pl.'s MTR, ECF No. 37.¹

I. BACKGROUND

A. Statutory Framework

CMC is a healthcare provider that operates over 25 facilities in California. Mot. at 2. To offset its operation costs associated with malpractice liability, CMC applied for and received federal grant funding pursuant to the to The Federally Supported Health Centers Assistance Act of 1992 ("FSHCAA"), See Pub. L. No. 104-73, 109 Stat. 777 (1995) in 2021 and 2022; see also Mot. at 2. As a recipient of this funding, the Secretary of Health and Human Services (HHS) deemed CMC an employee of the United States Public Health Service ("PHS") "for the purposes of" 42 U.S.C. § 233. See § 233(g)(1)(A); see also Mot. at 1, 4. Under 42 U.S.C. § 233, the Federal Tort Claims Act ("FTCA") is the only remedy for certain medical-malpractice suits against PHS

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for September 27, 2022.

employees. § 233(a). However, the FTCA's applicability is not automatic. Instead, the United States Attorneys—in accordance with Attorney General's delegation of such duties—evaluate when a lawsuit's alleged actions or omission triggers the FTCA's coverage. § 233(b)-(1). If a healthcare provider—like CMC—is sued in state court, FSHCAA provides two avenues for the case's removal to federal court: (1) the Attorney General can remove the case after certifying the defendant is a deemed PHS employee whose actions or omissions fall within the FTCA's purview; or (2) the healthcare provider can remove the case on its own if the Attorney General fails to appear within fifteen days of receiving notice of the case. See §§ 233(c), (1)(1)-(2).

B. CMC's Data Breach and Subsequent Class Action

After CMC applied and received FSHCAA funding in 2021 and 2022, CMC learned of an "external system breach" compromising its patients PHI and PII in October 2021. See Consolidated Class Action Compl. ("CCAC") ¶¶ 6 at 16, Exh. B to NOR, ECF No. 1-2.² After CMC notified its patients of the breach, Daniel Hinds filed suit against CMC in San Joaquin Superior Court based on various state laws. Id. ¶ 11; See State Ct. Docket ("Docket") at 2, Exh. B to NOR, ECF No. 1-2. Thereafter four more cases were filed—Beck, Donaire, Palermo, and Miranda—due to the same breach. See Mot. at 3. CMC forwarded each complaint to HHS, seeking its representation in all instances. See NOR ¶ 6. In January 2022, HHS's counsel denied CMC's request because CMC and its staff are

² Exhibit B to the NOR is the state court docket and is 417 pages. As a result, citation to this exhibit use the CM/ECF page numbers.

1 "deemed to be employees of the [PHS] *solely in medical*
2 *malpractice cases*" and the complaints' allegations do "not fall
3 under the auspice of the FSCHAA and FTCA." See Letters from
4 Dep't of Health & Hum. Serv., Exh. C to NOR, ECF No. 1-3.

5 Later that month, the state court consolidated the
6 abovementioned cases into the Hinds case, and the parties entered
7 a stipulated case management order requiring Plaintiffs to file
8 and serve a consolidated complaint by June 8, 2022. See
9 Stipulation Case Mgmt. Order No. 1 at 328, Exh. B to NOR, ECF
10 No. 1-2. Plaintiff filed and served Defendant the Consolidated
11 Class Action Complaint ("CCAC") on June 9, 2022. See Docket at
12 4. On June 13, 2022, CMS sent HHS and the United States Attorney
13 for the Eastern District of California ("United States Attorney")
14 the CCAC and letter seeking "removal of the consolidated class
15 action to federal district court and substitution of the United
16 States as the proper defendant in the places of CMC." See CMC
17 Letter to HSS and US Attorney, Exh. 1 to US Opp'n, ECF No. 27-3.
18 In accordance with § 233(1)(1), the United States Attorney
19 appeared in court on June 22, 2022 and explained he was
20 determining whether § 233's protection shielded CMC from
21 Plaintiff's allegations. See Mot. at 4; see also US Opp'n at 4.

22 On July 7, 2022, CMC asked the United States Attorney if he
23 would consent to CMC removing the case to federal court and
24 substitution of the United States in CMC's place. See Decl. of
25 Joseph Frueh ¶ 3, ECF No. 27-2. The United States Attorney
26 advised he was still evaluating the matter and "would oppose any
27 unilateral removal or attempt to compel the United States to
28 substitute as the defendant in lieu of CMC." Id. One day later,

CMC removed the action to federal court. See NOR; see also Mot. at 4, US Opp'n at 4. On August 5, 2022, the United States Attorney sent CMC a letter denying its request because the "available information" indicated the claims against CMC were not "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental or related functions." See US Attorney Letter to CMC, Exh 2. to US Opp'n, ECF No. 27-4.

II. OPINION

A. Analysis

1. CMC's Motion for Substitution

The parties dispute whether § 233 entitles CMC to absolute immunity and the United States' substitution in this suit. CMC argues these safeguards are applicable because: (1) § 233 immunizes PHS employees from claims stemming from "the performance of medical or related functions within the scope of their employment," see Mot. at 6 (citation omitted); (2) CMC was deemed a PHS employee during the data breach's occurrence; and (3) the management of PHI and PII is a related function that falls "within the scope of its . . . deemed status." Id. CMC contends these facts taken together demonstrate "CMC is immune from this action under § 233(a) and substitution of the United States is proper because Plaintiff's exclusive remedy is a claim against the United States under the [FTAC]." Id. at 6-7.

The United States argues CMC's motion fails because CMC fails to identify a statute allowing this Court to mandate the Government's substitution under these circumstances. See US Opp'n at 4. Specifically, although it concedes § 233(a)

1 provides a mechanism by which deemed PHS employees can assert an
2 immunity-defense that requires plaintiffs to pursue their claims
3 against the United States pursuant to the FTCA, the Government
4 asserts "nothing in the text of § 233(a) authorizes a federal
5 court to force the United States to substitute in place of a
6 defendant in an existing lawsuit." US Opp'n at 5. The Government
7 argues the same is true of §§ 233(c) and (1)(2). Id. at 7

8 a. Section 233(a)

9 Section 233(a)'s statutory history evidences its inability
10 to serve as the basis for CMC's request. Enacted in 1970, § 233
11 was cast in the likeness of the Federal Drivers Act of 1961 that
12 "made an action against the United States under the FTCA the
13 'exclusive' remedy for 'personal injury' . . . resulting from the
14 operation by any employee of the Government of any motor vehicle
15 while acting with the scope of his office or employment." Levin
16 v. United States, 568, U.S. 503, 508 n.2 (2013). If the Attorney
17 General declined to represent a federal employee who thought a
18 claim against him fell under the Federal Drivers Act's purview,
19 he could either: (1) independently pursue a defense under the
20 statute; or (2) file suit under the Administrative Procedure Act
21 ("APA") challenging the Attorney General's refusal to defend him.
22 See Sangemino v. Zuckerberg, 454 F. Supp. 206, 208-09 (E.D.N.Y.
23 1978) (stating that "the failure (or even refusal) of the
24 Attorney General to supply an appropriate certification will not
25 preclude a defendant driver from invoking the personal immunity
26 of the Federal Drivers Act in defense of such an action."); see
27 also Proietti v. Levi 530 F.2d 836 (9th Cir. 1976) (finding that
28 "[t]he district court correctly asserted review jurisdiction

1 under the [APA]" regarding a federal employee's challenge to the
2 Attorney General denial of his request under the Federal Drivers
3 Act.)

4 Congress then replaced the Federal Drivers Act with the
5 Westfall Act of 1988. The Westfall Act extends its
6 predecessor's coverage to all federal employees and allows them
7 to petition a court "to find and certify that the employee was
8 acting within the scope of his office or employment" when the
9 Attorney General determines otherwise. Pub. L. No. 100-694,
10 § 6, 102 Stat. 4563, 4564-65 (1988), codified at 28 U.S.C.
11 § 2679(d)(3). If the court agrees with the petitioner, it
12 substitutes the United States as the suit's defendant. Id.
13 Notably, Congress did not modify § 233 or the FSHCAA with
14 similar language. This Court "presume[s] that such drafting
15 decisions are deliberate," United States v. Alexander, 175 F.3d
16 1117, 1121 (9th Cir. 2013), and accordingly finds Congress did
17 not intend for the Government's forceful substitution under
18 § 233(a). Moreover, the Court's conclusion is supported by the
19 fact the Westfall Act requires the United States to be served
20 according to Rule 4 of the Federal Rules of Civil Procedure
21 before its substitution occurs. See § 2679(d)(3). Section 233,
22 in comparison, does not. Thus, if the court allowed CMC's § 233
23 interpretation to prevail, courts could force the United States'
24 participation in lawsuits where jurisdiction over the Government
25 is not established—an outcome that flies in the face of due
26 process and will not be condoned by this Court

27 b. Sections 233(c) and (1)(2)

28 CMC also relies on §§ 233(c) and (1)(2) to support its

1 contention that this Court should force the United States'
2 substitution. See Mot. at 1-2. As discussed above, the former
3 allows the Attorney General to remove a matter after he certifies
4 the defendant is a deemed PHS employee whose actions or omissions
5 fall within the FTCA's purview. See § 233(c). The latter, in
6 comparison, allows a healthcare provider to unilaterally remove a
7 case if the Attorney General fails to appear within fifteen days
8 of receiving notice of the case. See § 233(l)(1)-(2). Here,
9 neither scenario is applicable because the Attorney General:
10 (1) did not issue such a certification; and (2) timely appeared
11 in court. As a result, neither provision aids CMC's argument that
12 § 233 allows this Court to force the United States' substitution
13 in this suit.

14 Given district courts "are creatures of statute, and they
15 have only so much of the judicial power of the United States as
16 the acts of Congress have conferred upon them," Bath County v.
17 Amy, 80 U.S. 244, 247-48 (1871), the Court agrees with the
18 Government and finds it lacks the statutory authority to grant
19 CMC's request. CMC's motion for substitution is accordingly
20 denied. Furthermore, given the Court reached its decision because
21 of the Government's opposition, it finds Plaintiff's filings
22 regarding this matter moot and need not address them.

23 2. Plaintiff's Motion for Remand

24 Plaintiff urges this Court to remand this case because CMC
25 removed this action on July 8, 2022—over seven months after
26 Mr. Hinds filed his suit on November 11, 2021. See Pl.'s MTR at
27 8. As a result, Plaintiff contends CMC failed to comport with 28
28 U.S.C. § 1446(b), which provides:

1 [t]he notice of removal of a civil action or proceeding
2 shall be filed within 30 days after the receipt by the
3 defendant, through service or otherwise, of a copy of
4 the initial pleading setting forth the claim for relief
5 upon which such action or proceeding is based, or
6 within 30 days after the service of summons upon the
7 defendant if such initial pleading has then been filed
8 in court and is not required to be served on the
9 defendant, whichever period is shorter.

10 Because CMC removed this action thirty days after receiving
11 Mr. Hinds' initial pleading, Plaintiff argues CMC's removal
12 is untimely and requires this action's remand to state court.

13 Id. CMC, in response, contends its removal was timely
14 because: (1) it removed the action within thirty days of its
15 receipt of the CCAC; and (2) two decisions in the District of
16 South Carolina provided CMC with a new basis to remove this
17 action. See Def's Opp'n to Pl.'s MTR at 2-3.

18 The Court agrees with Plaintiff and finds CMC's removal
19 untimely. The Court reaches this conclusion because of:
20 (1) § 1446(b)'s plain language identifying the initial
21 pleading as the filing initiating the thirty-day window by
22 which an action can be removed; and (2) case law finding "the
23 plain language of the statute requires a paper that shows a
24 ground for removal that was previously unknowable or
25 unavailable." Chan Healthcare Grp., PS v. Liberty Mut. Fire
26 Ins. Co., 844 F.3d 1133, 1142 (9th Cir. 2017). Here, because
27 CMC fails to cite to any allegation in the CCAC that was
28 unavailable in Mr. Hinds' initial pleading as the basis for
removal, grounds for removal were knowable or available to
CMC on November 11, 2021. As a result, its opportunity to

1 remove this cause of action expired on December 11, 2021.
2 Furthermore, even if the Court found CMC's argument that the
3 District of South Carolina's decisions provided a novel
4 removal basis, its removal would still be untimely. Those
5 orders were published on June 2, 2022, and CMC's removal was
6 filed July 8, 2022—thirty-six days later.

7 Thus, for the reasons set forth above, the Court grants
8 Plaintiff's motion for remand. Moreover, because Plaintiff's
9 motion is granted, the Court finds the United States' motion
10 regarding this matter moot and does not need to directly
11 address its arguments.

12 B. Sanctions

13 This Court issued its Order re Filing Requirements ("Filing
14 Order") on July 11, 2022. ECF No. 5-2. The Filing Order limits
15 reply memoranda to five pages. Filing Order at 1. The Filing
16 Order also states that an attorney who exceeds the page limit
17 must pay monetary sanctions of \$50 per page. Id. CMC exceeded
18 the Court's five-page limit when it replied to the Plaintiff's
19 Opposition to CMC's motion for substitution by four pages and
20 the United States' Opposition to CMC's motion for substitution
21 by six pages. See Reply to US Opp'n; Reply to Pl.'s Opp'n. The
22 Court therefore ORDERS CMC's counsel to pay \$500.00 to the Clerk
23 for the Eastern District of California no later than seven days
24 from the date of this Order.

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III. ORDER

For the reasons set forth above, the Court DENIES CMC's motion for substitution and GRANTS Plaintiff's motion for remand.

IT IS SO ORDERED.

Dated: November 30, 2022


JOHN A. MENDEZ
SENIOR UNITED STATES DISTRICT JUDGE